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IN THE

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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 752

In the Matter
of

GEORGE ARKY, formerly doing business as Lawrence
Electric Construction Co., Bankrupt,
Petitioner,
LOUIS P. ROSENBERG, Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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STATUTES CITED:

Bankruptcy Act, Section 14c (3)	5, 7, 10, 13, 14
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AUTHORITIES CITED:

Brandenburg on Bankruptcy—3rd Edition Section 370	6, 15
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Petition for Writ of Certiorari.

*To the Honorable Harlan Fiske Stone, Chief Justice of
the United States and the Associate Justices of the
Supreme Court of the United States:*

Petitioner, George Arky, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on December 3rd, 1943, affirming on different grounds the judgment of the District Court for the Eastern District of New York, dated April 23rd, 1943.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On April 25th, 1942, petitioner filed an involuntary petition in bankruptcy. The same day an order of adjudication was entered (R., p. 1). On the 28th day of August, 1942, specifications of objection to the bankrupt's dis-

charge were filed by the Trustee, Louis P. Rosenberg with the Honorable Wilnot L. Morehouse, Referee in Bankruptcy (R., pp. 1 and 2).

Hearings were held and testimony taken thereafter and as a result thereof, the Referee rendered a decision denying the bankrupt's discharge on the ground that prior to the filing of the petition in bankruptcy the said bankrupt issued a materially false financial statement and obtained a loan from the Public National Bank & Trust Company upon reliance thereon (R., pp. 33 and 35).

The facts in regard to the giving of this false financial statement were these. On August 9th, 1939, the Bankrupt issued a financial statement to the Public National Bank, and at the same time the bankrupt made a loan from the said Bank in the sum of \$504. On this financial statement, the Referee found that the bankrupt set forth accounts payable in the sum of \$1,100, whereas, actually his accounts payable amounted to \$1,642.81 on the date in question, or a sum of about \$500 in excess of the amount alleged by the bankrupt (R., p. 33).

The loan was made on August 15th, 1939, and the bankrupt made monthly payments of \$42, until in February 1940, when there was a balance of \$294. At that time, the loan was refinanced and finally paid in full on March 7th, 1941 (R., pp. 18, 22).

The testimony establishes, without contradiction, that at the time the petition in bankruptcy was filed, the loan had been fully paid off 13 months prior thereto; that the Public National Bank was not scheduled as a creditor and did not file a proof of claim for any amount at all (R., pp. 22 and 34).

On these facts, it was held that it was immaterial that the said loan had been fully paid prior to the filing of the petition in bankruptcy and that the said Public National Bank was not listed as and was not a creditor at the time of the filing of the petition (R., p. 34).

A petition for review of the Referee's decision was filed in the United States District Court for the Southern District of New York, and the same came on to be heard before the Hon. Robert A. Inch, a Judge of the said Court (R., pp. 1 and 36).

On April 23, 1943, the said Referee's order denying the discharge to the bankrupt was affirmed by the United States District Court. Judge Inch held that it was not required that the financial statement be given at any particular time prior to the bankruptcy, and that payment of the creditor prior to the filing of the bankruptcy petition did not justify granting a discharge. He did, however, indicate that he hoped Congress would make a different rule (R., p. 36).

On May 23rd, 1943, a notice of appeal from said order was filed to the Circuit Court of Appeals for the Second Circuit (R., p. 39).

On December 3rd, 1943, the Circuit Court of Appeals for the Second Circuit handed down its decision confirming the order of the United States District Court above stated and denying a discharge to the bankrupt.

In denying discharge to the bankrupt, the said Circuit Court of Appeals considered the question that the loan obtained by means of the false financial statement had been fully paid prior to the filing of the petition in bankruptcy. In deciding adversely to this petitioner, the said Circuit Court of Appeals ruled that it was immaterial when the false financial statement was issued and whether or not the loan secured thereby was paid prior to the filing of the petition in bankruptcy.

Throughout these proceedings and in the appeals above indicated, the bankrupt appeared by Gettinger & Gettinger, as his attorneys. The Trustee, Louis P. Rosenberg, appeared in person (R., p. 1).

JURISDICTION.

The jurisdiction of the Supreme Court of the United States is invoked under the act of February 13th, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240; Title 28 U. S. C. A., Section 347. The judgment sought to be reviewed is that of the United States Circuit Court of Appeals for the Second Circuit entered on July 24th, 1942 (R., p. 45), affirming on different grounds the decision of the District Court for the Southern District of New York.

QUESTIONS PRESENTED.

1. Whether a discharge may be denied to a bankrupt upon and based on matters unconnected in any way with the proceedings before the Court.

2. Whether the issuance of a false financial statement by the bankrupt three years before the petition in bankruptcy is filed and the obtaining of a loan thereby, which loan was fully paid as it became due, also some years prior to the filing of the petition in bankruptcy, is sufficient ground for the denial of the discharge to the bankrupt.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals as to the denial of the discharge to a bankrupt on the ground that said bankrupt issued a false financial statement, by means of which he obtained property, even though both the financial statement and the repayment of said loan as it became due took place years before the filing of the petition in bankruptcy, involves a question

of Federal law which has not been but should be settled by this Court.

There is considerable conflict and confusion in the Bankruptcy Courts in regard to the construction and application of the Statute Section 14c (3) of the Bankruptcy Act which states the following:

"A bankrupt may be denied a discharge if he has

* * *

(3) obtained money or property on credit or obtained an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition."

In the case at bar, the above provision was construed by the Circuit Court of Appeals to mean that a false financial statement issued years before the bankruptcy may be the basis for denial of a discharge and further that it will not matter that the loan obtained thereby was paid off when due, also some years prior to the bankruptcy.

On the other hand, however, Remington on Bankruptcy (5th Edition, Vol. 7—Section 3340) quotes with approval a contrary rule laid down in what Professor Remington termed "a well considered case", viz., *In re Milhoff*, 40 A. B. R. 72 (Special Master Ohio affirmed by District Court). This case holds that while the Statute (*supra*) contains no limitation as to time, it is a matter of common sense to state that the objection to the discharge must bear some connection with the subject matter of the bankruptcy proceedings.

Accordingly, where a creditor to whom the false financial statement was issued was fully paid prior to the filing of the petition and there was no one who was in any way

damaged by the statement in question, the same cannot be the basis for the denial of the discharge.

This rule was also enunciated by other authorities.

See *Brandenburg on Bankruptcy* (3rd Edition—Section 370);

In re Gilpin, 160 Fed. 171, modified 165 Fed. 607 (D. C. Pa.);

In re Terens, 176 Fed. 938 (D. C. E. D. Wisconsin).

The same view was reiterated in the *Matter of Weinstein*, 34 Fed. (2) 964 (District Court of California), stating as follows:

"I do not believe that Congress intended to bar the door to a sinner who has repented. I do not believe that the sins of a lifetime which are wholly unrelated to a matter before a Court should be regarded by a Court unless it appear that the sinner is unrepentant and still engaged in his evil course."

In the case of *Josephs v. Powell & Campbell*, 213 Fed. 627, the District Court was reversed by the Circuit Court of Appeals for the Second Circuit and a discharge denied to the bankrupt on the express ground that at the time of the filing of the bankruptcy petition, the debt obtained by means of the false financial statement was still unpaid.

The ruling of the Court below in the case at bar is the first decision of a Circuit Court of Appeals on the point involved, and as such is in conflict with the authorities above set forth. It concerns an important point of construction of the Federal Bankruptcy Act, and it is respectfully submitted that the doubt and contradiction in the various Federal Courts on this point should be resolved by this Court.

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Some Federal Courts expressed opinion pointing to the need that this point be settled by reliable authority—

“There is no well considered case involving this question although there are some that bear upon it.”

In re Milhoff (supra).

In the case at bar, Judge Inch in the United States District Court thought that Congress should settle the point in controversy (R., p. 36).

The great importance of the statute (Section 14c (3) Federal Bankruptcy Act) involved to the business world and the legal profession and the need of one authoritative decision on the question involved (as to the time within which a false financial statement can be considered as bearing upon the bankrupt's rights to a discharge and the effect of payment to all creditors who relied on said statement prior to the filing of the bankruptcy petition), justify the granting of a review by certiorari to the petitioner.

WHEREFORE, it is respectfully submitted that the petition should be granted.

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